

VZCZCXRO7690  
PP RUEHAG RUEHROV RUEHSL RUEHSR RUEHTRO  
DE RUEHBS #1524/01 3171628  
ZNY CCCCC ZZH  
P 131628Z NOV 09  
FM USEU BRUSSELS  
TO RUEHC/SECSTATE WASHDC PRIORITY  
INFO RUCNMEU/EU INTEREST COLLECTIVE PRIORITY  
RUCNMEM/EU MEMBER STATES COLLECTIVE PRIORITY  
RUEHGG/UN SECURITY COUNCIL COLLECTIVE PRIORITY  
RUEKJCS/DOD WASHDC PRIORITY  
RHEHNSC/NSC WASHDC PRIORITY  
RUCPDOG/USDOC WASHDC PRIORITY  
RUEAIIA/CIA WASHINGTON DC PRIORITY  
RUEATRS/DEPT OF TREASURY WASHDC PRIORITY  
RUEAWJA/DEPT OF JUSTICE WASHDC PRIORITY  
RHEFHLC/DEPT OF HOMELAND SECURITY WASHINGTON DC PRIORITY

C O N F I D E N T I A L SECTION 01 OF 03 BRUSSELS 001524

NOFORN  
SIPDIS

STATE FOR IO, EEB, EUR/ERA, S/CT  
TREASURY FOR TFI

E.O. 12958: DECL: 11/13/2019  
TAGS: [ETTC](#) [KTFN](#) [PTER](#) [UNSC](#) [EFIN](#) [KJUS](#) [PINR](#) [EUN](#) [BE](#)  
SUBJECT: TERRORISM SANCTIONS REFORM: EU VIEWS AND PROCEDURES

REF: BRUSSELS 1515

Classified By: USEU ECON MINISTER COUNSELOR PETER CHASE FOR REASONS 1.4  
(b) and (d)

-----  
Summary  
-----

1. (C//NF) In preparation for a Belgium-sponsored conference on UN targeted sanctions reform (REFTEL), USEU held separate meetings with sanctions officers and legal advisors from the EU Council Secretariat and the European Commission. Commission officials posited - but would not speculate on the likelihood of - a "catastrophic" scenario under which European courts request additional documentary evidence in support of sanctions designations, thereby crossing a threshold into the substance of UN Security Council or EU Member State decision-making. Even though EU court procedural rules are silent on the use of intelligence in support of sanctions designations, EU institutions have determined that Member States should declassify such intelligence to the maximum extent possible. Council officials insisted that the Council would never reject a UN decision, since any Member State obstructing UN sanctions would have to justify such action directly in New York. They also stressed that enhanced due process at the UN would be helpful but that improvements in the quality of publicly releasable information were far more important for lawyers arguing cases before the European courts; no amount of due process in New York will ever fully appease European courts. Separately, the European Parliament has questioned the legal basis by which the EU will administer counterterrorism sanctions upon entry into force of the EU's Lisbon Treaty. Parliament has referred the matter to its own Legal Service, seeking a legal interpretation by which Parliament would have a "co-decision" role over EU sanctions designations and program design. END SUMMARY.

-----  
European Commission: Courts May Weigh  
Substance over Form  
-----

2. (C//NF) USEU met with a team from the European Commission in preparation for the Government of Belgium-sponsored "Seminar on Strengthening the UN Targeted Sanctions through Fair and Clear Procedures" (REFTEL). Commission

representatives included Albertus Straver, Roger Matthews (a UK HMT secondee), and Stephane Chardon, all sanctions experts from the Directorate General for External Relations, along with Minas Konstantinidis of the Legal Service.

13. (C//NF) Konstantinidis expressed particular concern over the second Kadi case, which is pending an accelerated procedure before the European Court of First Instance. He explained that the UN's statement of reasons is the only information currently available to the court. Commission lawyers fear that judges in the case will request additional documentary evidence, thereby crossing a new threshold into the details and substance of a UN sanctions designation.

14. (C//NF) Straver posited a "catastrophic" situation in which an EU judge inquiring into the substance of a UN decision found no satisfaction. "We should conclude that a judge who has requested information expects to see it and is prepared to annul a designation," he continued. Commission interlocutors could not predict the likelihood of such a scenario but stressed that lawyers and petitioners had shown a great desire to pry into the substantive detail of UN and EU decision-making. A high court decision annulling an individual sanctions designation would leave no outlet for appeal and would remove the grounds for a related asset freeze. Similarly, should the high court strike down an underlying implementing Regulation, EU Member States lacking national UN counterterrorism sanctions implementation legislation would lose the legal authority to implement asset freezes domestically via the EU mechanism. Straver inquired about classified information available at the UN, claiming

BRUSSELS 00001524 002.2 OF 003

that the Commission's recent meeting with the 1267 Committee Chair and Monitoring Team officials seemed unclear on this point.

15. (C//NF) ECONOFF asked if the Commission had sought support from EU Member States or encouraged them to share classified information with European courts. Konstantinidis replied that the rules of proceedings for European courts were silent on the use of intelligence but that the courts have expressed willingness in principle to admit additional sources of information. The Commission and Council have nonetheless determined that EU Member States should declassify intelligence supporting sanctions designations to the maximum extent possible, since EU courts have indicated that some information must be provided to designated individuals and therefore must be declassified. "If we did receive classified information, we wouldn't know what to do with it," he confided. Straver further emphasized the preference for unclassified information by highlighting the importance of public opinion. He noted that the select cases making headlines had led Members of the European Parliament to create enormous political trouble. He opined that European courts had not given sufficient credit to procedural innovations included in UNSCR 1822 but insisted that the court's fundamental criticism was that due process standards in New York were clearly insufficient.

-----  
EU Council Secretariat: Robust, Accurate,  
Unclassified Information is Vital  
-----

16. (C//NF) USEU subsequently met with Francesco Fini of the EU Council Secretariat Directorate General for External and Politico-Military Affairs and Richard Szostak of the Council's Legal Service.

17. (C//NF) Fini and Szostak said that a new EU counterterrorism sanctions Regulation should be complete by the end of 2009. Fini noted that the Council could create a deadline for the European Parliament's required, but non-binding, opinion. They described the draft Regulation as primarily a codification of existing internal due process

measures. Under current practices, the Commission sends a statement of reasons (e.g., the UN statement of case or narrative summary) to the affected party upon notification of the EU's implementation of a UN sanctions designation. The individual or entity then has four to six weeks to submit "observations." EU institutional reviews occur only when observations involve new information, i.e. beyond simple declarations of innocence without substantive basis. In at least one case, the designee successfully demonstrated manifest factual errors in the UN-provided statement of reasons.

18. (C//NF) Upon passage of the draft Regulation, EU reviews of UN sanctions designations will involve a new Regulatory Committee that will operate by "comitology." The Commission will thus prepare paperwork and propose actions, but decision-making authority will remain with EU Member States. The European Parliament will have only an informational role in the Regulatory Committee, ensuring that the Council does not exceed its legislative mandate. Whenever appropriate, the EU Presidency will advocate internally on behalf of a petitioner presenting potentially exculpatory information. Final results of any EU review will be communicated to the UN 1267 Committee. Fini and Szostak insisted that the Council would never reject a UN decision, since any Member State obstructing UN sanctions would have to defend itself directly in New York and would not have recourse to the EU de-listing process. In their view, the EU would limit its objections to requests for additional information from UN institutions and Member States. Such exchanges would address EU concerns (e.g., factual inaccuracies), "without putting the UN in a difficult situation."

19. (C//NF) Turning to the subject of future sanctions-related challenges in European courts, Szostak expressed relief that the European courts have thus far

BRUSSELS 00001524 003.2 OF 003

refrained from assessing UNSC political decisions. He expects this deference to continue, provided that UN procedures and narrative summaries are "solid." Szostak averred, however, that factual errors in statements of case had been the most significant problem for the Council Legal Service. He stressed that enhanced due process in New York would be helpful but that improvements in the quality of publicly releasable information were far more important for lawyers arguing cases before the European courts. In his view, robust, accurate statements are "the key to the survival of the regime in New York." Fini and Szostak agreed that no amount of due process in New York will ever appease European courts, which will continue to require internal EU review to compensate for perceived gaps in the UN process. But EU lawyers depend on pointing to incremental improvements in New York to justify mainta

---- no  
"co-decision with the ordinary  
legislative procedure" (i.e., co-decision).

11. (SBU) In concluding teuldr to Parliament's Legal Service "to protect the jurisdiction of this institution." Contacts believe that the Commission and Council position will prevail but caution that Parliament retains the option of challenging these other institutions before the EU courts.  
MURRAY